LAI KOK KIT

v.

MBF FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
HAIDAR MOHD NOOR JCA
AZMEL MAAMOR J
[CIVIL APPEAL NO: B-02-227-96]
3 APRIL 2000

CONTRACT: *Frustration - Proper test - Change of circumstances - Impossibility - Whether there was fundamental or radical change in circumstances - Absence of supervening event - Whether there was no impossibility - Whether contract not frustrated*

By an agreement dated 28 August 1987 ('first agreement') the plaintiff charged his property to the defendant and secured a loan of RM80,000 from the latter. Following the plaintiff's default in repayment, the defendant obtained an order for the sale of the property by way of public auction ('order for sale'). The first auction sale was however aborted as there were no bidders. Thereafter, the plaintiff and the defendant agreed to restructure the loan facility, and they hence entered into another agreement ('second agreement'). By the second agreement, the defendant granted the plaintiff a fresh loan of RM80,000 and also a personal loan of RM5,000. The defendant also undertook to cancel or withdraw the order for sale. The agreement however stated that, upon default, the restructuring plan would be revoked and the defendant is entitled to fall back on the first agreement.

The defendant attempted but failed to cancel or withdraw the order for sale. Be that as it may, from June 1991, the plaintiff ceased to honour his obligations under the second agreement. The defendant sought to recover the balance due under the personal loan, as well as the balance under the first agreement, and in the circumstances, filed two separate actions against the plaintiff. The plaintiff retorted by suing the defendant for negligence and breach of contract for the failure to obtain a withdrawal or cancellation of the order for sale. The learned judge found that the defendant was obliged to cancel or withdraw the order for sale, but ruled that the second agreement was frustrated as its main object was rendered impossible of performance. The learned judge also negatived negligence on the part of the defendant. Dissatisfied, the plaintiff appealed.

Held:
Per Gopal Sri Ram JCA:

[1] Where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible of performance and it is not discharged by frustration.

[2] The learned judge was wrong in holding that the second agreement was frustrated. The present case does not concern a supervening event. It concerns a change in circumstances that were not radically different from those that prevailed at the time the second agreement was entered into. All that happened was that the defendant had failed to pursue its best endeavours to secure the sale or withdraw the order for sale. The defendant could have either appealed to the High Court under s. 418 National Land Code against the decision of the Land Administrator refusing to adjourn the auction, or it could have appealed to the Supreme Court from the decision of the High Court refusing to set aside the order for sale. Neither of these was done.

[3] The primary obligation under the second agreement was on the defendant to do what it promised, namely to have the order for sale cancelled or withdrawn. The facts showed that by June 1991, *ie*. the date of the alleged default, that obligation remained plainly unfulfilled. Since the defendant had breached its part of the bargain, it does not lie on its mouth to complain of the plaintiff's default. The plaintiff was within his right to refuse to continue performance of his obligations under the contract in view of the defendant's default.

[4] Upon the making of the second agreement, and upon the defendant's breach of it, the rights of the parties were to be determined in accordance with that agreement. The second agreement had put an end to the first agreement and, notwithstanding the clause in the second agreement allowing the defendant to revert to the first agreement upon default, the defendant did not have the right to have recourse to the first agreement. Accordingly, the sum claimed by the defendant in the Sessions Court were irrecoverable. However, the plaintiff was under a separate obligation to pay the personal loan given to him under the second agreement.

[Appeal allowed; order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Melalui satu perjanjian bertarikh 28 Ogos 1987 ('perjanjian pertama') plaintif telah menggadaikan hartanahnya kepada defendan dan memperolehi satu pinjaman sebanyak RM80,000 daripada defendan. Berikutan dengan keingkaran plaintif dalam pembayaran balik, defendan telah mendapatkan satu perintah untuk penjualan hartanah tersebut melalui satu perlelongan awam ('perintah untuk jualan'). Penjualan perlelongan pertama tersebut telah walaubagaimana gagal kerana tiada penawar. Kemudiannya, plaintif dan defendan bersetuju untuk menyusun-semula kemudahan pinjaman tersebut, dan mereka dengan itu memasuki satu perjanjian yang lain ('perjanjian kedua'). Melalui perjanjian kedua, defendan memberikan plaintif satu pinjaman baru sebanyak RM80,000 dan juga satu pinjaman peribadi sebanyak RM5,000. Defendan juga mengakujanji untuk membatalkan atau menarikbalik perintah untuk jualan tersebut. Perjanjian itu namun begitu menyatakan bahawa, jika berlaku keingkaran, pelan penyusunan semula tersebut akan dibatalkan dan defendan berhak untuk berpaling kepada perjanjian pertama itu.

Defendan cuba tetapi gagal untuk menarik balik atau membatalkan perintah untuk jualan. Oleh itu, daripada bulan Jun 1991, plaintif tidak lagi melaksanakan kewajipan-kewajipan beliau di bawah perjanjian kedua. Defendan cuba untuk memperolehi semula baki yang kena dibayar di bawah pinjaman peribadi tersebut, dan juga baki di bawah perjanjian pertama, dan dalam keadaan tersebut, telah memfailkan dua tindakan yang berasingan terhadap plaintif. Plaintif membalas dengan mendakwa defendan kerana kecuaian dan kemungkiran kontrak kerana gagal untuk memperolehi satu penarikan balik atau pembatalan akan perintah untuk jualan tersebut. Hakim yang bijaksana mendapati bahawa defendan berkewajipan untuk membatal atau menarikbalik perintah untuk jualan tersebut, tetapi memutuskan bahawa perjanjian kedua telah terbantut kerana tujuan utamanya telah menjadi mustahil untuk dilaksanakan. Hakim yang bijaksana juga menafikan kecuaian oleh defendan. Berasa tidak puashati, plaintif telah merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Di mana selepas satu kontrak telah dimasuki berlaku satu perubahan keadaan tetapi keadaan yang berubah itu tidak merupakan perubahan yang radikal atau penting dalam kewajipan yang pada asalnya diakujanjikan untuk menjadikan perlaksanaan kontrak tersebut sesuatu yang secara radikalnya berbeza daripada yang pada asalnya diakujanjikan, kontrak tersebut tidak menjadi mustahil untuk dilaksanakan dan ianya tidak terbatal kerana kebuntuan.

[2] Hakim yang bijaksana telah khilaf dalam memutuskan bahawa perjanjian kedua telah dibantutkan/dikecewakan. Kes semasa ini tiada kaitan dengan pistiwa yang mendahului. Ianya berkaitan dengan perubahan keadaan yang tidak berbeza secara radikalnya daripada yang sedia ada ketika perjanjian kedua itu dimasuki. Apa yang berlaku adalah bahawa defendan telah gagal untuk meneruskan usahanya yang terbaik untuk menjamin penjualan tersebut atau untuk menarikbalik perintah untuk jualan tersebut. Defendan mungkin boleh merayu kepada Mahkamah Tinggi di bawah s. 418 Kanun Tanah Negara terhadap keputusan Pentadbir Tanah yang enggan untuk menangguhkan perlelongan tersebut, atau ianya boleh merayu kepada Mahkamah Agong daripada keputusan Mahkamah Tinggi yang enggan untuk mengenepikan perintah untuk jualan tersebut. Tidak satu pun daripada ini dilakukan.

[3] Kewajipan utama di bawah perjanjian kedua adalah ke atas defendan untuk melakukan apa yang dijanjikan olehnya, iaitu untuk memastikan bahawa perintah untuk jualan tersebut dibatalkan atau ditarik-balik. Fakta-fakta menunjukkan bahawa sehingga bulan Jun 1991, iaitu tarikh kemungkiran yang dikatakan itu, kewajipan itu kekal tidak terlaksana. Oleh kerana defendan telah memungkiri bahagiannya daripada perjanjian tersebut, ianya tidak boleh mengadu mengenai kemungkiran plaintif. Plaintif mempunyai hak untuk enggan terus melaksanakan kewajipan-kewajipannya di bawah kontrak tersebut memandangkan kemungkiran defendan.

[4] Setelah membuat perjanjian kedua, dan atas kemungkiran defendan terhadapnya, hak pihak-pihak tersebut haruslah ditentukan menurut perjanjian tersebut. Perjanjian kedua telah menamatkan perjanjian pertama, dan walaupun terdapat fasal dalam perjanjian kedua yang membenarkan defendan untuk berpaling kepada perjanjian pertama setelah berlakunya kemungkiran, defendan tidak mempunyai hak untuk berpatah-balik kepada perjanjian pertama tersebut. Sehubungan itu, jumlah yang dituntut oleh defendan dalam Mahkamah Sesyen tidak dapat diperolehi. Walaubagaimanapun, plaintif berada di bawah kewajipan yang berasingan untuk membayar pinjaman peribadi yang diberikan kepadanya di bawah perjanjian kedua.

[Rayuan dibenarkan; perintah sekadarnya.]

Case(s) referred to:

Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223 ***(refd)***

Dato' Yap Peng v. Public Bank Bhd [1997] 4 CLJ 115 ***(refd)***

Ramli Zakaria & Ors v. Government of Malaysia [1982] 2 MLJ 257 ***(foll)***

Suparmarl Ltd v. Federated Homes Ltd [1981] 9 Const LR 25 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 15
Contracts Act 1950, s. 57(2)
National Land Code 1965, ss. 263, 265, 418

For the appellant - SS Ravichandran (V Meena with him); M/s Seah Balan Ravi & Co
For the respondent - Paramjit Kaur (HY Loo & SP Ng with her); M/s JM Chong, Vincent Chee & Co

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

This appeal has been brought against the decision of the High Court at Shah Alam which found for the respondent on the point of frustration. It is necessary to hearken to the facts of this case in order to appreciate the issues that the appeal raises.

For convenience, we will refer to the parties according to the titles assigned to them in the court below.

The plaintiff was the registered proprietor of a double-storeyed terrace house in Klang ("the subject property"). In 1987 the plaintiff charged the subject property to the defendant to secure a loan of RM80,000. The loan was guaranteed by two persons who are not concerned in this appeal. At some point after the disbursement of the loan, the plaintiff defaulted in making repayment. For completeness we will say that that loan was made under agreement dated 28 August 1987 ("the first agreement"). Following the plaintiff's default, the defendant instituted foreclosure proceedings for the sale of the subject property by way of public auction. Those proceedings were instituted before the Land Administrator Klang who, on 17 December 1988, granted an order for sale pursuant to s. 263 of the National Land Code 1965.

The first public auction for the sale of the subject property was fixed on 21 March 1989. But there were no bidders. So the auction was aborted. There then followed a train of events that has led to the present litigation.

In or about June 1989, the plaintiff approached the manager of defendant's branch in Klang (DW1 in the court below). The learned judge found; and we accept his finding on this point; that an agreement was entered into between the plaintiff and the defendant to restructure the loan facility that formed the subject matter of the first agreement.

On 14 June 1989, the defendant wrote to the plaintiff a letter setting out the terms and conditions of the restructure. It is an important document and has a significant bearing upon this case. For that reason we will reproduce the main parts of that letter. This is what it says:

> We refer to the above and are pleased to inform you that your request to restructure the above loan has been approved in principle. As such, the amended terms and condition are as follows:
>
> i) Restructured Amount – $80,000.00.
>
> ii) Period – 19 years (228 months) inclusive of 36 months grace period for monthly interest servicing.
>
> iii) Interest Rate – 8.50% p.a. A.R. (remain unchanged).
>
> iv) Repayment – Interest to be serviced monthly for 36 equal months; the 1st month to be due and payable on 1/7/1989 and thereafter by 192 equal monthly instalment of principal and interest of $777,42 each.
>
> Please take note that you are required to give us an irrevocable undertaking letter from your employer, KCT to deduct your salary as follows and the cheque made payable in favour of MBf Finance Bhd:
>
> i) Personal Loan Repayment – PLPK 414 – $176.40
>
> ii) Housing Loan Repayment – HLPK 249 – $566.67
>
> ---
>
> Total Deduction $743.07
>
> and the 1st deduction must reach us on or before the first (1st) of every month w.e.f. 1/7/1989.
>
> *In the event of default of the above terms and condition, we reserve the right to revert back to the present status. This restructuring plan would then deem to be revoked and thereafter legal proceedings will be continued without further reference to you.*
>
> Kindly signify your acceptance to the above by signing and returning to us the duplicate copy of this letter within 14 days from date hereof together a sum of $608.00 being the differential sum between your outstanding balance and the restructured amount failing which the above approval is deemed cancelled.
>
> If you have further queries, please do not hesitate to contact the undersigned. (emphasis added.)

The plaintiff accepted the terms set out in the aforesaid letter by signing a copy of it. We will refer to this document as "the second agreement".

Following the execution of the second agreement, steps were taken to implement its terms. This was done by the defendant granting the plaintiff a fresh loan of RM80,000 and a personal loan of RM5,000. The latter sum was to be utilised to settle the arrears of interest due under the first agreement. The plaintiff opened a savings account with the defendant into which he paid his salary. The defendant debited the instalments payable under the second agreement from that account.

The obligation on the defendant under the second agreement was, as found by the judge, to cancel or withdraw the order for sale. The defendant did in fact take some steps in this direction.

On 27 July 1989 it wrote to the Land Administrator. It asked for the auction to be adjourned until November 1989. But it did not ask for cancellation or withdrawal of the sale. The Land Administrator refused the adjournment.

Subsequently the defendant applied to the High Court in Shah Alam. Its application is dated 3 April 1991. It moved the court for an order setting aside the order for sale made by the Land Administrator. On 8 April 1991, the High Court declined the defendant's application.

From about June 1991 onwards the plaintiff ceased to honour his part of the bargain. The defendant then took out two actions against the plaintiff. One action was in the Magistrates Court. It was for the recovery of the balance due under the personal loan granted under the second agreement. The other action was commenced in the Sessions Court. It was to recover the whole of the balance due from the plaintiff to the defendant under the First Agreement.

We may mention that in the meantime the subject property had been sold by public auction. But the sum realised was insufficient to satisfy the defendant's claim under the first agreement. The shortfall was about RM22,000. The Sessions Court's action sought to recover that sum.

In the meantime, the plaintiff also took out proceedings. He sued the defendant for negligence and for breach of contract. The essence of his complaint was that the defendant had breached its obligation to obtain a withdrawal or cancellation of the order for sale.

All three actions were tried by the High Court in Shah Alam. The learned judge found, as we have already said, that there was an agreement between the parties under which the defendant had undertaken an obligation to cancel or withdraw the Land Administrator's order for sale. However, the learned judge went further. He found that the main object of the second

agreement had been rendered impossible of performance. He held that it was frustrated. He then purported to act under s. 15 of the Civil Law Act 1956 to adjust the rights of the parties. The learned judge however negatived negligence on the part of defendant.

Before us, Mr. Ravichandran of counsel for the plaintiff has not sought to question the finding of the learned judge on the issue of negligence. He has however criticised the learned judge's finding upon the issue of frustration. And it is to that point that we must now address our minds.

The essence of Mr. Ravichandran's complaint is that the learned judge was wrong in treating this case as one coming within the doctrine of frustration. He says that the learned judge ought to have dealt with the case purely on the footing of a breach of contract. His argument is that this is a case of an obligation voluntarily undertaken by the defendant, namely to withdraw or cancel the order for sale. And the defendant had plainly failed to fulfil that obligation.

Counsel further argues that once the second agreement had taken effect, the First Agreement was at an end, so that a breach of the former does not revive the latter. In support of this argument he read to us a passage from the decision in *Suparmarl Ltd v. Federated Homes Ltd* [1981] 9 Const. LR 25, at p. 34 which is as follows:

> In any event, in my view, a failure by Federated to honour such a term, even if it were part of a compromise agreement, would not entitle Supamarl to treat the compromise agreement as repudiated, and in fact they have never sought to do so until after the relationship between the parties had come to an end in October 1976. Having regard to my finding that Federated lawfully terminated the contract, Mr. Blackburn's second line of argument does not arise. However, in case it is of any assistance, I shall state my views on it. I accept Mr. Smith's suggestion that in the present case we are dealing with a promise for a promise type of accord and satisfaction and not one which depended upon the actual performance of that which had been promised by Federated. It is to be noted in favour of Federated that the first two instalments of 5000*l* each were paid as and when due.
>
> In such circumstances, in my judgment, the original claims ceased to exist and **the liability thereunder was discharged when the compromise agreement was entered into and these original claims cannot be revived whatever may have happened to that agreement** and whether or not it has been repudiated, either because a breach of the agreement as such or if in fact there was a repudiation arising out of the repudiation of the main contracts had Supamarl's case on the first issue been correct. I do not think that the claims made in March 1976 can be revived in any form whatsoever, either on the basis of *quantum meruit* or on any other basis. I think that **once the original claims**

> **were compromised effectively in a binding agreement, the only remedy that Supamarl would have would be to claim for damages for breach thereof**. (emphasis added.)

Cik Paramjit Kaur for the defendant has raised two arguments in response. Her first is that this is a plain case of frustration. She says that the judge was right in the finding he made upon all the issues. Her second argument is that the decision in *Suparmarl (ibid)* is wholly irrelevant to the present case because of the express clause contained in the second agreement which entitles the defendant to revert to the original position whenever there is a default. Counsel has drawn our attention to the fact that the plaintiff had defaulted in his obligation in June 1991 and for a period of five months thereafter. She says that once the plaintiff defaulted, the relevant clause in the second agreement (to which we have lent emphasis) was activated and her client was accordingly entitled to recover all sums due under the first agreement. Before we address the merits of these arguments, it is necessary for us to examine the relevant principles that govern the issues raised before us.

In *Ramli bin Zakaria & Ors v. Government of Malaysia* [1982] 2 MLJ 257 at p. 262, Abdul Hamid FJ, (later CJ) enunciated what amounts to frustration. He said:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

We accept that statement to be an accurate proposition governing the law of frustration. In the words of s. 57(2) of the Contracts Act 1950:

> A contract to do an act which, after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The element of unlawfulness appearing in the section has no part to play in the present appeal. Here, it is simply a question as to whether the obligation voluntarily undertaken by the defendant became impossible of performance in the sense explained by Abdul Hamid FJ in the passage quoted above.

Mr. Ravichandran argues that there is no impossibility involved in the present case because the defendant did not establish that it had done all that it could do to have the order for sale cancelled or withdrawn. In

particular, counsel points out that the defendant could have either appealed to the High Court under s. 418 of the National Land Code 1965 against the decision of the Land Administrator. Or it could have appealed to the then Supreme Court from the decision of the High Court refusing to set aside the order for sale. Neither of these things was done. Counsel also points out that it was open to the defendant to have saved the subject property by participating in the auction under s. 265 of the National Land Code 1965. We find much merit in these arguments.

In our judgment, the present case does not concern a supervening event, for there was none. It concerns a change in circumstances that were not radically different from those that prevailed at the time the second agreement was entered into. All that had happened was that the defendant had failed to pursue its best endeavours to secure the sale or withdraw the order for sale. We therefore agree with counsel for plaintiff that the present case is governed by the case of *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 which this court applied in *Dato Yap Peng v. Public Bank Bhd* [1997] 4 CLJ 115; [1997] 3 MLJ 484. We would adopt what Kerr J said in *Dalmia's* case:

> However, leaving aside for the moment contracts affected by war, it is settled law in England (and on the evidence also in India) that a supervening prohibition of some contractually undertaken obligation, which can be overcome by obtaining a licence, will only frustrate a contract at once if the person affected by the prohibition can show that no licence could in any event have been obtained. If this is uncertain, then his obligation is to use his best endeavours to obtain the necessary licence, and the contract then only becomes frustrated if and when all such efforts have failed. In such a situation the 'probability test' never appears to have been applied. It is not reflected in *Andrew Millar & Co Ltd v. Taylor & Co Ltd* [1916] 1 KB 402 (a case of wartime illegality which was cited by both parties) or in the discussion of that case in *Atlantic Maritime Co Inc v. Gibbon* [1953] 2 Lloyd's Rep 294; [1954] 1 QB 88.
>
> However, whatever may be the position in English law, my task is to make a finding on the evidence about the true construction and effect of s. 56 in relation to Indian law and what I have called the 'wait and see' and the 'probability' tests. As to these tests I can only find that on the material before me there is no shred of any evidence, other than Mr. Lall's unsupported assertion to the contrary, that the 'probability test' is part of the law of India. It is nowhere reflected in the language of s. 56, and I do not see how it can be implied. In *Satyabrata's* case (at p. 326) the Supreme Court followed Lord Wright in *Denny Mott & Dickson v. James B Fraser* [1944] AC 265 by quoting from his speech at p. 274 where he said:
>
> > The issue (frustration or not) has got to be decided by the court *ex post facto* on the actual circumstances of the case.

That brings us to Cik Paramjit's argument that her client was entitled to revert to the original position if there was no frustration. The simple answer to her submission is this.

The primary obligation under the second agreement was on the defendant to do what it promised, namely to have the order for sale cancelled or withdrawn. By June 1991 (date of the alleged default by the plaintiff) that obligation remained plainly unfulfilled. Since the defendant had breached its part of the bargain it does not lie on its mouth to complain of the plaintiff's default. In our judgment, the plaintiff was clearly within his rights to refuse to continue performance of his obligations under the contract in view of the defendant's default. The clause in the second agreement upon which the defendant relies is accordingly is of no assistance to it.

It follows from what we have said thus far that upon the making of the second agreement and upon the defendant's breach of it, the rights of the parties were to be determined in accordance with that agreement. The defendant in our view did not have the right to have recourse to the first agreement. Accordingly the sums claimed by it in the Sessions Court action were clearly irrecoverable. However, the plaintiff was under a separate obligation to pay and settle the personal loan given him under the second agreement. Mr. Ravichandran accepts that his client is so liable.

For the reasons already given, we are of the view that this appeal must succeed. To summarise, the learned judge was wrong in holding that the second agreement was frustrated. We also hold that the second agreement had been breached by the defendant. We further hold that the first agreement had ceased to be in force. Accordingly we would set aside the orders made by the learned judge. We would enter judgment for plaintiff in his action. We would dismiss the Sessions Court action. We would uphold the judge's findings in respect of the Magistrates Court's action. The damages recoverable by the plaintiff must be assessed by the registrar of the High Court. For that purpose, we remit the case to the High Court. In assessing the damages, the registrar must give credit to the defendant for the sums it has recovered in Magistrates Court action. The plaintiff will have the costs of this appeal as well as the costs in the court below and all costs in the assessment proceedings. The deposit shall be refunded to the appellant.